UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK UNIVERSITY
Employer
and Case 02-RC-023481

GSOC/UAW
Petitioner

POLYTECHNIC INSTITUTE
OF NEW YORK UNIVERSITY
Employer
and Case 29-RC-012054

INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE,
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)
Petitioner

PETIONER'S REPLY BRIEF TO THE BRIEF OF NEW YORK UNIVERSITY

TABLE OF CONTENTS

TABLE OF CASES

FEDERAL CASES

NLRB CASES

I. INTRODUCTION

This petition involves a bargaining unit previously represented by the Petitioner. From 2000 until 2005, the UAW represented a unit of graduate assistants employed by NYU. That unit included student employees in three broad categories: student employees who taught, classified as Teaching Assistants ("TAs"); student employees who conducted research, classified as Research Assistants ("RAs"); and student employees who performed other tasks, classified as Graduate Assistants ("GAs"). These employees were enrolled as graduate students at NYU, performed services for NYU that were related to their graduate education, and received "stipends" as payment for performing those services. Excluded from this unit were RAs in the physical sciences whose research was supported by grants from external funding sources such as the government. Also excluded were graduate students who taught classes but who had exhausted the stipends that the Employer offered and who were compensated in the form of a salary.

While the Board exercised jurisdiction over graduate student employees, the parties successfully negotiated a collective bargaining agreement. After that contract expired, the Employer seized upon the holding of Brown University, 342 NLRB 483 (2004) that graduate student assistants are not employees and withdrew recognition. In 2009, evidently anticipating that the Board would reconsider Brown because of the lack of any basis for its holding, the Employer embarked upon a reclassification scheme which obscured the identities of many of the student employees who are now filling the roles formerly held by unit employees. The Union filed the instant petition to enable graduate students employees of NYU to decide whether they wish to re-establish the bargaining relationship that had previously functioned successfully. These are

employees who would be represented today had the Board not pulled the rug out from under their bargaining relationship. The Union does not seek to force the Employer to grant recognition based solely on that bargaining history. The Petitioner is merely seeking to allow these employees to vote, for a second time, to form a Union. The Employer seeks to prevent that election from being held.

The Acting Regional Director issued a decision which identified, as nearly as possible, the student employees who are now filling the roles previously filled by unit employees. He also concluded that, if an election were to be held, RAs funded by external grants should also be permitted to vote because the record of this case, unlike the record in New York University, 332 NLRB 1205 (2000) ("NYU I"), establishes these RAs "are performing services for pay" for NYU (Dec. at 27). He found that these employees share a community of interest because they do work for the university which is related to and in furtherance of their education. Their dual status as employees and students sets them apart from other employees and establishes their separate community of interest.

The Acting Regional Director dismissed the petition on the holding of Brown that "graduate student assistants are not employees." 342 NLRB at 493. The Board in Brown defined "graduate student assistants" as individuals "who perform services at a university in connection with their studies...." 342 NLRB at 483. As the Regional Director recognized, all of the employees sought by the Petitioner fall within his definition, despite the fact that the Employer no longer uses the titles TA and GA. The Petitioner filed a Request for Review of the dismissal of this petition, asking the Board to overrule Brown and order an election in a unit of student employees. The Board

granted review and issued an order permitting the parties to file briefs to address certain questions raised in the above-captioned cases. The Employer's attorney filed separate briefs on behalf of NYU and of Polytechnic Institute of New York University, respectively. This brief in submitted in reply to the brief submitted by NYU.

II. NYU's ARGUMENTS DEMONSTRATE THE ABSURDITY AND INDEFENSIBILTY OF THE *BROWN* HOLDING

Prior to 2009, most NYU graduate students who taught undergraduate students were classified as TAs and compensated for this work through the payment of "stipends" under the "MacCracken" financial aid program. (NYU I, 332 NLRB at 1210; Dec. 5, 9).[1] In the Fall of 2009, the Employer began to eliminate the TA classification. At that time, the largest of the schools within the University, the Graduate School of Arts and Sciences ("GSAS"), implemented "Financial Aid Reform 4" ("FAR 4") which eliminated the connection between teaching and the payment of stipends (Dec. 5-6, 9). Nevertheless, graduate students continued to teach for pay. The Employer transferred them from the payroll category for TAs to the payroll category for adjunct faculty and began to call them adjunct faculty (Dec. 1; Tr. 376). The Employer set their salaries based upon provisions of the collective bargaining agreement covering adjunct faculty (Dec. 14). The Acting Regional Director found that graduate students newly classified as adjuncts continue to perform substantially the same work as they previously performed when classified as TAs (Dec. 15-16). He also found that the reclassification

---

[1] References to the record shall be as indicated:

Acting Regional Director's Decision and Order Dismissing Petition .....Dec. (followed by page number)
Brief on Review of New York University .....NYU Br. (followed by page number)
Transcript .....Tr. (followed by page number)
Petitioner's Exhibits .....Pet. Ex. (followed by exhibit number)
Employer's Exhibits .....Er. Ex. (followed by exhibit number)

of TAs as adjunct faculty members resulted in the addition of approximately 600 graduate students who perform teaching functions to the adjunct faculty classification (Dec. 13; Charts C & D). The Employer does not dispute this finding.[2]

As a result of its decision to reclassify TAs as adjunct faculty, NYU now agrees that they are statutory employees (NYU Br. at 28). NYU recognizes that graduate students who teach classes in exchange for an adjunct salary perform services under the direction of the Employer in exchange for compensation and therefore are employees. NYU acknowledges that the difference between a graduate student adjunct and a TA is whether they are paid by salary or by stipend, stating that "the distinction in those classifications was based only on the nature of the funding." (NYU Br. at 6). Thus, according to the Employer, a graduate assistant is an "employee" if he is paid a "salary", but not if his pay is labeled a "stipend".

NYU argues that the reclassification of TAs as adjuncts "separated, to the greatest extent possible, the work done by graduate students as teachers from their other activities as students." Before turning to a discussion of the points made by the Employer to explain this "separation," it is worth pausing to recognize the significance of this statement. NYU has admitted that graduate students who teach do "work" for the university. It has also recognized that this work relationship is something that is separable from the student relationship. The Employer, by its statements and its conduct in reclassifying these individuals, has demonstrated that the same individual can be both student and employee, and that the employee relationship can be treated separately. Thus, the Employer has demonstrated the central fallacy of Brown.

---

[2] A similar program was implemented elsewhere within the University in the Fall of 2010, resulting in the reclassification of more TAs as adjunct faculty (Dec. 12.fn.10).

NYU makes three arguments in bullet pointed paragraphs to explain how it created this separation between the work of graduate student teachers and their status as students. A consideration of these three bullet points reveals that all NYU has done is to change the titles given to graduate students who teach and to change the name given to the compensation paid to them. According to the Employer, that is all it takes to make it possible for these student employees to engage in collective bargaining without impacting their role as students.

The first of the three bullet point arguments (at pp. 29-30) is that NYU students now receive stipends that are separate from their adjunct salaries. In the very next paragraph, the Employer points out that the TAs in Brown and NYU I were required to teach in order to receive their stipends. Thus, like TAs, graduate student adjuncts are required to teach in order to receive their pay. In either case, students perform work in exchange for compensation. All that has changed is the name given to the payment.

The Employer's second argument is that teaching was required of all graduate students at Brown and at the time of NYU I, while graduate students are not required to teach as a condition to receiving their stipends. As found by the Regional Director, the financial aid system continues to be structured in such a fashion to pressure students to work as adjuncts in order to fund their educations (Dec. 10). Moreover, the fact that teaching is not directly linked to the payment of stipends does not mean that it is any less related to education. The Acting Regional Director made extensive findings that teaching continues to be "an integral component of graduate education" at NYU (Dec. 16). As Professor Andrew Ross testified, "without teaching, the doctorate is all be worthless." (Dec. 17; Tr. 1411-12). The Employer does not challenge the Acting

Regional Director's factual finding that work as an adjunct is an element of graduate education. Thus, the fact that teaching is not formally a requirement to receive a degree does not separate the work done by graduate student teachers from their education.

The Employer's third bullet point is the most transparent of all. "Finally, in Brown and NYU I, the TAs had to be enrolled as students.... Here student status is not required to serve as an adjunct instructor". (NYU Br. 30). NYU has taken employees from a job classification reserved for students and, without changing their duties, moved them to a job classification which includes non-students. The Employer is willing to concede that they are employees as a result of nothing more than a change in job title. This discloses the lack of any substance to the claim that graduate student employees are not employees.

The Employer argues that the experience with collective bargaining at NYU demonstrated that collective bargaining can harm academic freedom. The Employer points to statements in reports by committees appointed by the University claiming that grievances filed by the Union challenged the academic mission of NYU (NYU Br. 34-35). For example, according to the Final Report of the Senate Academic Affairs Committee and Senate Executive Committee of the University, "The Committee considered that the time-consuming and heavy filing of grievances was the most serious disadvantage of the contract." (Er. Ex. 38, p. 8). The Committee relied upon the testimony of a University administrator that the Union had filed 8 grievances during the 4 year term of the contract that "would have undermined the faculty's decision-making dominion had an arbitrator gone the other way." (Ibid, p. 9). It would seem to be something of an exaggeration to describe 8 grievances over 4 years as "heavy filing of

grievances...."[3] The report noted that, of those 8 grievances, only one was pending when the collective bargaining agreement expired, while the other 7 had been resolved "favorably for the University." (Ibid, p. 9). Two of those grievances were pursued to arbitration (Er. Ex. 40, 41). The others were therefore resolved ***between the parties*** without resort to arbitration. In other words, the evidence cited by the Employer shows that the parties were able to resolve issues that had some potential impact on academic freedom without resort to arbitration.

The Employer also argues that academic studies fail to establish that collective bargaining does not interfere with student-faculty relations or with academic freedom (NYU Br. 35-36). As stated in our principle brief, the Petitioner believes that those studies do contradict the assumptions relied upon by the Board in Brown. One fact, however, is clear. There is no evidence to support the claim made by the majority in Brown that collective bargaining harms academic freedom. The Employer's expert conceded that there is no evidence that unionization of graduate assistants harms the student/faculty relationship or undermines academic freedom (Tr. 1062).

In conclusion, there are many reasons to hold that graduate assistants are "employees" within the meaning of section 2(3) the Act. This holding is mandated by the broad language of the statute and by Supreme Court and NLRB decisions which recognize the broad sweep of that language. This holding would be consistent with the Board's long recognition that apprentices can be both students and employees simultaneously. This holding would be consistent with the experience of successful collective bargaining among graduate assistants in the public sector and at NYU itself.

---

[3] This is not to dispute that the Union filed a substantial number of grievances that related to employment and compensation issues.

This holding is also mandated by the Board decision in Boston Medical Center, 330 NLRB 152 (2000) and St. Barnabas Hosp., 355 NLRB No. 39 (2010), holding that student physicians are statutory employees, as well as the experience of successful collective bargaining among interns and residents as described in the *amicus* brief filed by the Committee of Interns and Residents/SEIU. Finally, this holding is supported by the simple, logical premise that there is no inconsistency between being an employee and being a student. The Employer has made no arguments that would justify continuing to deprive graduate student employees of the right to engage in collective bargaining.

III. THE ACTING REGIONAL DIRECTOR CORRECTLY FOUND THAT RAs WOULD BE EMPLOYEES IF *BROWN* WERE OVERRULED

The Acting Regional Director found that, unlike NYU I, the unit in this case should include science RAs funded by external grants. He based this conclusion on the record developed at the hearing, which established facts that were absent from the record in NYU I. In particular, the Acting Regional Director found that research is one of the main priorities of the University, that work performed by RAs funded by external grants fulfills this mission, and that the University benefits from this work (Dec. 20). He found that, to obtain external funding, the University is obligated to provide the funding agency with a grant application that includes a description of the work to be performed by all personnel funded by the grant, including RAs (Dec. 20). The earnings of RAs working under such grants are treated as personnel costs (Dec. 20). If the application is approved, then the Employer is responsible for ensuring that funds are expended consistent with the grant application (Dec. 21). RAs are required to provide twenty hours per week of services in exchange for payment (Dec. 21). Thus, they perform services that benefit the

Employer, under the direction and control of the Employer, in exchange for compensation. The Employer does not dispute these factual findings. Under the broad, common-law definition of "employee" reflected in section 2(3), RAs should therefore be found to be employees. See, e.g., NLRB v. Town & Country Elec. Co., 516 U.S. 85 (1995); Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984); Boston Med. Ctr., supra.

The Employer makes both a factual and a legal argument that RAs funded by external grants should be found not to be employees. Both arguments are fallacious. The legal argument is that Leland Stanford Junior University, 214 NLRB 621 (1974) and NYU I hold that "RAs who are performing research in connection with their doctoral programs are not employees under the Act." (NYU Br. 38). As explained in greater detail in our principal brief, those cases do not stand for such a sweeping proposition. Rather the Board concluded that the record in those cases did not establish that the RAs at issue performed services for the university in exchange for compensation (See Brief of the Petitioner pp. 27-28). The Acting Regional Director's findings of fact establish that, today, RAs at NYU who are funded by external grants do perform services for the university, under its direction and control, in exchange for compensation.

The Employer also points to findings by the Acting Regional Director that the conditions under which RAs conduct their research have not changed since NYU I. (NYU Br. at 41). Notwithstanding that testimony, the Employer makes the inconsistent argument that RAs in the social sciences "are indistinguishable" from RAs in the social sciences who do not receive funding from external grants. These RAs were included in

the bargaining unit under NYU I, yet the Employer would exclude them now. The Employer cannot have it both ways.

The Regional Director concluded that all of the graduate student employees, including the RAs, have a relationship with the University that "is both academic and economic." (Dec. 6). There is ample evidence to support this finding that RAs, including those funded by external grants, have an economic relationship with the university. The record clearly establishes three important facts. First, by conducting research, RAs funded by external grants produce a product and perform a service that is of value to NYU. Second, they conduct this research under the direction and control of agents of the Employer. Third, they do this in exchange for compensation. Thus, like graduate students who teach for pay, RAs funded by external grants are "employees" within the meaning of the Act.

With respect to the value of research to the Employer, the record reflects that research is central to NYU's mission. (Tr. 263-64, 363, 593-94). As Dean Benhabib testified, "Research is one of the main priorities. We . . . expect our faculty to engage in research and teaching. Our main mission is divided between . . . the education of students, and undertaking research. It is done across all the schools and departments." (Tr. 363). He explained, original research is one of the "products" that NYU generates. "Insofar as rankings are an indication of the quality of good research, the quality of research, universities pay attention because **essentially what we are producing is research** and we want it to be the best we can." (Tr. 435).

RAs funded by external grants help the university to produce this product. Each grant has a PI, who in most cases is a regular faculty member. (Tr. 233, 267). The PI

selects the students who will serve as RAs on the grant project. (Tr. at 466-67). When selecting an RA, faculty members are most concerned with hiring individuals who can "do a good job." (Tr. 467). They look for students with interest in "the topic that the faculty member is working on or carrying out the research," and who "have particular skills that are suitable to that particular research" and "have taken the classes that are necessary for that particular research project." (Tr. 466-67). Thus, the criteria that faculty use in hiring RAs are those that any employer looks for when selecting employees: merit and an ability to do the job. It is therefore no surprise that NYU's own internal literature on grant-funded research categorizes RAs working on such projects as "employees" who draw a "salary" for their services. (Pet. Ex. 16, 19).

Once an RA is hired, he performs work for NYU with all of the indicia of employment. The University is accountable to the funding source for all work done on an externally funded project by RAs. (Dec. 21; Tr. 233-34) The grant itself defines the research that will be performed, and usually specifically provides for RAs to work on the project. (Dec. 20; Tr. 271-72; Pet. Ex. 14). The grant application may also specify "RA salaries" associated with the grant. (Tr. 590; Er. Ex. 22). (Tr. 271-72, 291-92). NYU defines RAs working on externally-funded grant projects as "graduate students whose time is divided between formal study and research." (Pet. Ex. 16, at 2). In addition, the grant designates how much "effort" the RAs will expend on the project. "Effort," is a designation of how much time the RA will devote to the grant, versus how much time the RA will devote to educational purposes; typically, 100% effort on a grant application means that the RA will devote half of her time to work on the grant, and half of her time to educational purposes such as completing her dissertation. (Tr. 291-92). NYU policy

officially permits an RA working at 100% effort to devote 20 hours per week to the grant project, but the record establishes that RAs often spend much more than 20 hours per week working in the laboratory or research installation.[4] (Tr. 191, 391). When an RA is hired to work on a grant at 100% effort, "that's the student's employment. The student has that job. So the student cannot teach or do any other activities because the student already has a position." (Dec, 31-22;Tr. 851-52; Er. Ex. 11, at 7).

Research performed by RAs helps to generate income for the university. In addition to the RAs' salaries and benefits, external grants pay for other personnel costs, including faculty and staff salaries, tools, equipment, and travel costs. (Dec. 20;Tr. 268-69; Pet. Ex. 16; Pet Ex. 19). External grants also reimburse NYU for "facilities and administrative" or "F&A" costs, which are essentially overhead costs that have already been incurred by the University. (Dec, 20; Tr. 264-75, 303; Pet. Ex. 19). NYU holds the patents for anything created out of research conducted on its campus, which can lead to additional income to the University. (Dec. 21;Tr. 240-42, 477). Accordingly, when RAs funded by external grants conduct research, they generate one of the "products" that NYU exists to create and they provide valuable services to the university.

It is also beyond question that they do so under the direction and supervision of the PI. The PI directs RAs in the performance of their duties, defining the research questions that need to be answered for the grant project. (Tr. 421-22; Er. Ex. 19). The PI ensures that the RA performs work consistent with the grant application, and that the RA is committing "effort" to the project commensurate with the "effort" delineated in the grant. (Tr. 174-75, 196, 278, 280, 894; Pet. Ex. 18, at 6; Pet. Ex. 20, at 4). A standard

[4] The 20-hour per week limit is due to the fact that many RAs are foreign nationals, and Federal regulations prohibit F-1 and J-1 visa holders from working more than 20 hours per week. (Tr. 322).

RA appointment letter states that, as a condition of receiving funding as an RA, the RA must "satisfactorily fulfill the assigned research assistant responsibilities and successfully carry out any other responsibilities of your appointment." (Er. Ex. 21). Similarly, the Steinhardt School's official Ph.D. funding plan states that RAs "will be required to undertake the work and activities required by the externally funded project as outlined in the grant proposal." (Er. Ex. 46). Thus, when a student accepts a position as an RA on a grant-funded project, he or she works at the direction of a PI in furtherance of the grant-funded project. (Tr. 421-22; Pet. Ex. 16; Er. Ex. 11, at 6).

The record also leaves little doubt that the stipends paid to RAs from the proceeds of external grants constitute payment for performing this research. The PI's duty to ensure that the RA's effort is a reflection of the fact that the RA hired to work on a grant-funded project is compensated for performing work that must be consistent with the grant application. (Tr. 270, 271-72).[5] RAs are paid a "salary" from the grant funds. (Pet. Ex. 16, at 2; Pet. Ex. 19). These salaries are "regarded by the IRS as 'salary for services rendered,' the income is reported, and W-2 forms are issued annually by the University." (Pet. Ex. 63, at 21). The Employer argues that these payments should not be considered "salary" because the amount of the stipend is the same as that awarded to fellows who are not required to conduct research. (NYU Br. 41). Although RAs typically receive the same amount of funding as Ph.D. students funded by internal fellowships, fellowships are awarded to students "simply to do coursework and conduct

[5] NYU cites an example of a graduate student who allegedly was not informed that he was an RA until the end of the semester, when he was required to provide a report to demonstrate that his work was consistent with the grant application (NYU Br. 27). The requirement that he produce this report illustrates that the University required him to demonstrate that the work he performed fulfilled the requirements of his job.

their own research." (Tr. 373, 474, 1662-63; Pet. Ex. 37; Er. Ex. 11, at 3).[6] RAships, by contrast, "are made with the expectation of students providing up to twenty hours per week engaged in a research project as directed by a faculty member." (Er. Ex. 11, at 6). Thus, RAs provide services for NYU, help to produce one of the products of the university, provide these services under the direction and supervision of agents of NYU, and receive compensation for that work.

NYU argues that, despite all of this evidence that NYU benefits from the work performed by RAs, the Acting Regional Director was unjustified in finding that NYU has an economic relationship to the RAs because there was insufficient evidence to support his finding that externally funded research has become more important to the university since the time of NYU I. As a factual matter, this argument fails because there is extensive evidence to support the Acting Regional Director. As a legal matter, this argument fails because, regardless of the accuracy of the Board's findings about the situation 12 years ago, the record clearly establishes that RAs at NYU now "satisfy the classic definition of an employee."

Because research is now such an important product of its operations, NYU has three separate administrative offices to assist faculty and staff to obtain external funding for research: the Office of Sponsored Programs ("OSP"), which primarily assists with government grants; the Office of Industrial Liaison and Technology, which assists with corporate and industrial grants; and the University Development office, which helps obtain grants from private foundations (Tr. 240-42; Pet. Ex. 9). According to the Director of OSP, her office provides this assistance because "it's part of the mission of the University to promote research." (Tr. 237) In addition to OSP's efforts to increase

[6] Fellowship funds, although taxable as income, are not reported on a W-2. (Pet. Ex. 63, at 20).

grant funding, NYU has made significant investments in the research capacity on its campus (Tr. 257-58). As Dean Benhabib testified, "[t]here is growing recognition at NYU that attaining the objective of 'leading research university' requires research administration infrastructure," and NYU has invested significant resources in increasing its research stature, capacity, and funding (Tr. 263-64; Pet. Ex. 12; Pet Ex. 13). These investments include "new facilities to support faculty scholarship in genomics research and in soft condensed matter physics," and "major renovations of laboratories in the Silver Center," which houses the chemistry and biology departments (Pet. Ex. 10; Tr. 258-59). NYU has also created the Partners Initiative, a push to hire new faculty who "are stars in their fields." (Tr. 264; Pet. Ex. 10). The Partners Initiative is particularly relevant because the Principle Investigators ("PIs") named on external grant applications are typically faculty members, and the PI's reputation is a factor in whether the funding is awarded (Tr. 265-66). As a result of NYU's investment, external funding for research at the University is steadily growing (Tr. 250). In 1999, when the record in NYU I was developed, the University had externally funded research of around $60 million (Pet. Ex. 11; Tr. 255). By 2008, that number had jumped to $200 million. (Pet. Ex. 11).

Thus, the Acting Regional Director was correct in finding that research funded by external grants has increased in economic importance to the university. However, regardless of the extent of this change, the record establishes that RAs now provide a service to the Employer, produce a product of value to the Employer, work under the direction and supervision of its agents, and receive compensation for doing so. It is possible that these three elements existed in 1999 and were not reflected in the

evidence on the record. It is clear that these elements are present today. Therefore, RAs are employees within the meaning of section 2(3) of the Act.

IV. THE ACTING REGIONAL DIRECTOR PROPERLY INCLUDED RAs AND GRADUATE STUDENTS WHO TEACH CLASSES IN THE SAME BARGAINING UNIT

A. The Acting Regional Director Correctly Found that Graduate Students who were Unilaterally Reclassified as Adjunct Faculty by the Employer were not Accreted to the Adjunct Faculty Bargaining Unit

The Employer argues that, because it now classifies all graduate students who teach classes as "adjunct faculty," those student workers should be considered part of the bargaining unit of adjunct faculty members represented by UAW Local 7902. It is undisputed that TAs were represented separately from adjunct faculty and were excluded from the adjunct bargaining unit (Dec. 7). As noted above at p.4, it is also undisputed that, when it eliminated that TA job classification, the Employer converted hundreds of employees who previously would have been classified as TAs into adjunct faculty. The Employer now argues that, because these student employees are in a job classification that falls within the unit description for employees represented by Local 7902, its action in reclassifying these employees resulted in their inclusion in the Local 7902 bargaining unit.

The Acting Regional Director analyzed the question of whether these graduate students had been added to the adjunct bargaining unit as a question of accretion (Dec. 27). The Employer argues that this was improper (NYU Br. 48). The Board uses the term "accretion" to refer "to the addition of employees into a bargaining unit without an election." AG Communications Sys. Corp., 350 NLRB 168, 182 (2007). That is what the Employer claims has occurred in this case. Hundreds of students who would otherwise

have been classified as TAs are now classified as adjunct faculty (Dec. 13;Tr. 447-48, 649-50, 817-18; Er. Ex. 55). Thus, the Acting Regional Director correctly treated this as an accretion issue.

As the Board held in Frontier Telephone of Rochester, Inc. 344 NLRB 1270 (2005), enfd. 2006 U.S. App. LEXIS 12443 (2nd Cir.), the Board is a reluctance to find an accretion.

> One aspect of this long-standing restrictive policy, which was recently restated in *E. I. DuPont de Nemours, Inc.* [341 NLRB 607 (2004)], has been to permit accretion '**only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted.**' supra at 608, quoting *Ready Mix USA, Inc.*, 340 NLRB 946, 948 (2003).

344 NLRB at 1271(emphasis added).

The Employer argues that graduate students are covered by the terms of the recognition clause of the adjunct collective bargaining agreement (NYU Br. 45). "The determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards and criteria." Super Valu Stores 283 NLRB 134, 135 (1987), quoting Marion Power Shovel Co., 230 NLRB 576, 577-78 (1977). Thus, the Acting Regional Director applied the correct legal standard in finding that graduate students who teach retain a separate identity from other employees.

In the accretion context, two factors have been deemed to be "critical:" employee interchange and common day-to-day supervision. Frontier Telephone at 1271; DuPont at 608. "[T]he absence of these two factors will ordinarily defeat a claim of lawful accretion. This is not to say that the presence of these factors will establish a claim of

lawful accretion." Frontier Telephone at 1271, n. 7.

The evidence with respect to the two "critical" factors is insufficient to establish an accretion. There is one significant respect in which the supervision of student adjuncts and outside adjuncts differs substantially: hiring practices. Student adjuncts can and do use the contacts that they have established as students to obtain teaching positions. It is a part of the role of their mentors and faculty members to find teaching opportunities for them that will further their education. Given the critical role of teaching in graduate students' education, faculty members actively seek opportunities for their students to gain teaching experience. (Tr. 913, 1080). A faculty member seeking to place students will either recruit students on her own or through other members of the faculty (Tr. 583, 913, 1080, 1102). The record includes several examples of students who used contacts with faculty members in order to obtain teaching positions (Tr. 1276, 1356, 1531-32). Outside adjuncts do not enjoy the benefit of a system which obligates members of the University community to help them to find jobs.

The Employer argues, "There is a high degree of interchange among student and non-student adjuncts," (NYU Br. 49). In support of this assertion, the Employer cites to instances in which student and non-student adjuncts have taught similar courses. In an accretion case, the Board looks for evidence of temporary transfers of employees in the category sought to be added to the bargaining unit into positions in the established bargaining unit. Frontier Telephone, 344 NLRB at 1272. By definition, an employee cannot be both a graduate student adjunct and a non-student adjunct simultaneously. Such temporary transfers, therefore, are not possible.

In arguing that graduate students should be included in the adjunct bargaining unit, the Employer relies upon such factors as wage structure and benefit eligibility that result from the Employer's decision to reclassify TAs as adjuncts (NYU Br. 49-50). In determining whether to find an accretion, the Board gives little weight to factors such as wages and benefits that result from an employer's decision to treat a new group of employees as part of the bargaining unit. Safeway Stores, Cinc., 256 NLRB 918, 919 (1981); Dean Transportation, 350 NLRB 48, 59 (2007).[7]

On the other hand, as found by the Acting Regional Director, graduate student have a separate bargaining history and a different relationship with NYU (Dec. 18, 27). In addition, the record establishes that there is substantial interchange between student adjuncts and RAs, a factor which supports a finding of a bargaining unit composed of student employees in these two classifications. According to data supplied by the Employer, in response to subpoena, covering only academic year 2009 and the Fall semester 2010:

a) Of the 1244 graduate students who had adjunct appointments at any time during 2009, 157 or 12.6% also served as RAs during academic year 2009; of these, 35 held appointments as adjunct faculty and RAs during the same semester.[8]

b) An additional 68 of those 1244 graduate students who served as adjuncts in 2009 held RA appointments in the Fall of 2010;

c) There were 937 graduate student adjuncts during the Fall semester of 2010. Of these, 93 or 9.9% had served as Research Assistants during

---

7 Moreover, while offered the adjunct benefits, most graduate student employees participate in the student health plan, which offers substantially different benefits (Tr. 780).

8 Of these, four were appointed as RAs and as adjunct faculty at different times during the semester and two only overlapped by a single day. The remaining 29 student employees worked simultaneously as RAs and adjunct faculty for periods ranging from a few weeks to a full year (Er. Ex. 117).

the previous academic year.

(Pet. Ex. 76).

For all of these reasons, the Acting Regional Director properly found that TAs converted to adjuncts were not accreted to the adjunct bargaining unit, and that they share a separate community of interest with other graduate student employees.

B. The Acting Regional Director Properly Considered Differences in Working Conditions that Result from the Fact that Graduate Assistants are Students as well as Employees

The Employer argues that it was improper for the Acting Regional Director to consider differences in the working conditions of employees that result from the fact that they are also students (NYU Br. 54-58). The Employer argues that only terms and conditions of employment that arise directly out of the employment relationship can be considered in determining community of interest. This argument is not supported by the cases cited by the Employer and is, in fact, contradicted by Board cases which have considered student status and other relationships between employees and the institution that employs them. The general rule is that the Board considers the relationship between the employees and the institution that employs them in determining community of interest. In most instances, employees have only one relationship with that institution: the employment relationship. As the Acting Regional Director recognized, graduate student employees have different interests precisely because, unlike other employees, they have a dual relationship with their employer.

The Employer begins its argument by citing cases involving employees who also prisoners on work-release, e.g., Winsett-Simmons Engineers, Inc., 164 NLRB 611 (1967); Georgia-Pacific Corp., 201 NLRB 760 (1973), e.g., and employees who were

also military personnel. E.g. Lone Star Boat Mfg. Co., 94 NLRB 19 (1951), In these cases, the Board found that it was the relationship between the employee and the institution that employed him, not his relationship to another institution, such as prison or the military, that determines whether he shares a community of interest with other employees. These cases have nothing to say about employees who have a dual relationship with the institution that employs them. Where employees have a dual relationship with their employer, the Board takes this into consideration in deciding community of interest issues.

Such a dual relationship may exist when an employee also has a familial relationship with management. While section 2(3) contains an explicit exclusion for individuals employed by their parents, the Board will also exclude employees from a bargaining unit based upon other familial relationships. Thus, the Board has excluded the sister of the principal owner of the employer, Luce and Son, Inc., 313 NLRB 1335 (1994); the son-in-law of the president, R&D Trucking, Inc., 327 NLRB 531 (1999); and the son of a supervisor and minority owner who was also the nephew of other owners. Midwestern Mining & Reclamation, Inc., 277 NLRB 221 (1985). See generally, NLRB v. Action Automotive, Inc., 469 U.S. 490, 495 (1985), noting that, the closer the family relationship, the more likely the employee will be excluded from the bargaining unit. Thus, where an employee has a dual relationship with her employer, the Board will consider that relationship in determining whether she shares a community of interest with other employees.

The Board also has a long history of considering the dual status of student employees in deciding whether graduate assistants share a community of interest with

other employees. This is the true holding of Adelphi University, 195 NLRB 639 (1972), a precedent that was mischaracterized by the majority in Brown. In Adelphi, the Board held that teaching assistants had a separate community of interest from faculty members because the TAs were "primarily students." 195 NLRB at 640. Among the factors cited by the Board in concluding that graduate assistants should be excluded from a faculty unit were that they "are graduate students working toward their own advanced academic degrees, and their employment depends entirely on their continued status as such." Id. Similarly, the Board has considered "student status" in several other cases in excluding student employees from units of other employees at the universities where they were enrolled. See, e.g., Saga Food Serv. of Cal., 212 NLRB 786 (1974); Barnard Coll., 204 NLRB 1134 (1973); Cornell Univ., 202 NLRB 290 (1973); Georgetown Univ., 200 NLRB 215 (1972). Like family members, student employees have a separate community of interest because of their dual status.

In summary, the general principal to be derived from precedent is that the Board considers the relationship of a group of employees to the institution that employs them in deciding whether those employees share a community of interest with other employees. In the vast majority of cases, employees have only one relationship to that institution: they are its employees. When situations arise in which the employees have a second relationship with that institution, the Board would have to be willfully blind to ignore the effect of that dual status in deciding upon the scope of a bargaining unit.

The Employer cites Boston Medical Center, supra, as a case in which student physicians were included in a bargaining unit with non-student physicians. Boston Medical, involved an acute care hospital, and the Board did not base its unit

determination on traditional community of interest factors. Rather, the unit was based upon the Board's Final Rule on collective bargaining units in the health care industry, which established a unit of "all physicians" as the only appropriate unit of physicians at an acute care hospital. Despite the unit holding in Boston Medical, a different pattern of collective bargaining has developed. As reflected in the *amicus* brief of the Committee of Interns and Residents/SEIU, collective bargaining units limited to student physicians have been the norm based upon the agreement of the parties that student physicians have different interests from other physicians.

In conclusion, it was proper for the Acting Regional Director to consider students status in defining the appropriate unit. This is consistent with the bargaining history, Board precedent, and the pattern of bargaining that has evolved in another area where collective bargaining has been permitted to flourish among student employees.

V. THE SCOPE OF THE BARGAINING UNIT

The Employer argues that the Acting Regional Director's arbitrarily defined the bargaining unit by including certain hourly employees while excluding graduate student adjuncts who teach credit courses. The Acting Regional Director's unit determination is based upon two guiding principles that are consistent with Board precedent. First, he has recognized the importance of a history of collective bargaining to unit determinations. See, Grace Indus., LLC, 358 NLRB No. 62 (2012). Consistent with this principle, he has attempted to re-establish, as nearly as possible, the collective bargaining unit that existed before NYU withdrew recognition. Second, he took into consideration the dual relationship that graduate assistants have with their employer that affects their community of interest and differentiates them from other employees.

As we argue in Part III C of our principal brief, graduate student employees share a community of interest that arises out of the fact that they perform services related to and in furtherance of their education. The bargaining unit described by the Acting Regional Director is consistent with that principle. It includes hourly employees with the job title of "research assistant" and employees who provide assistance to a particular faculty member. These employees perform services that are related to their education (Pet. Ex. 56 at 17; Tr. 1385-86, 1403).

The Employer argues that the unit described by the Acting Regional Director is inconsistent with University of West Los Angeles, 321 NLRB 61 (1996) where, the Board included students working in a library in a unit with other librarians. There, the Board found that the student library clerks' employment was unrelated to their studies. The Employer argues that this case is inconsistent with a *per se* rule excluding students from a unit with other employees. The Petitioner does not argue for such a *per se* rule, and the Acting Regional Director did not apply such a rule. The Union's position is that student status is a relevant consideration to deciding community of interest. Units of graduate assistants, excluding other employees, are appropriate because such units are comprised of employees who share a community of interest resulting from the fact that they are performing work that is related to their education.

Finally, the Employer argues that it was "illogical" for the Regional Director to exclude graduate student adjuncts who teach credit courses (NYU Br. 57). This guideline was selected by the Acting Regional Director to define the bargaining unit in a manner consistent with the unit previously represented by the Petitioner. However, the Petitioner agrees that it may be more logical to give greater weight to the dual interest

as students and employees shared by all graduate student adjuncts and RAs, rather than attempting to draw too fine a line. Graduate students constituted a very small segment of the adjunct bargaining unit before the TA position was eliminated. Therefore, if the Board is persuaded by the Employer's argument on this point, it should define the bargaining unit to include all graduate student adjuncts as well as the other employees in the unit defined by the Acting Regional Director.

VI. CONCLUSION

The Board should reinstate the petition in Case No. 2-RC-23481 and direct an election in a unit composed of graduate student adjuncts, RAs, hourly graduate student employees with the job title 'research assistant,' and hourly employees who job title demonstrates that they are providing assistance to a specific faculty member.

RESPECTFULLY SUBMITTED,
THE PETITIONER

/s/ Thomas W. Meiklejohn
Thomas W. Meiklejohn
Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.
557 Prospect Avenue
Hartford, CT 06105
Phone: (860) 233-9821
Fax: (860) 232-7818

CERTIFICATE OF SERVICE

This hereby certifies that the foregoing Petitioner's Reply Brief to the Brief of New York University was electronically mailed, on this 17th day of August 2012 to all counsel of record as follows:

Edward A. Brill, Esquire
Brain Rauch, Esquire
Proskauer Rose, LLP
1585 Broadway
New York, NY 10036

Karen P. Fernbach, Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

James G. Paulsen, Regional Director, Region 29
National Labor Relations Board
Two Metro Tech Center, 5th Floor
Brooklyn, NY 11201-3838

/s/ Thomas W. Meiklejohn
Thomas W. Meiklejohn